Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO: A 27/2011

In the matter between:

CHARLES ARTHUR SCOTT Appellant

and

RICHARD MOIR N.O. Respondent

CORAM	:	**D H ZONDI & A G BINNS-WARD JJ**
JUDGMENT BY	:	**D H ZONDI J**
FOR THE APPELLANT	:	**ADV. C L REILLY**
INSTRUCTED BY	:	**GEOFF SMITH ATTORNEYS (GEORGE)**
FOR THE DEFENDANT	:	**ADV. A L HEYNS**
INSTRUCTED BY	:	**CILLIER ODENDAAL (GEORGE)**
DATE OF HEARING	:	**05 AUGUST 2011**
DATE OF JUDGMENT	:	**19 SEPTEMBER 2011**

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JUDGMENT DATED THIS 19th DAY OF SEPTEMBER 2011

Coram: ZONDI AND BINNS-WARD JJ

ZONDI, J:

[1] This is an appeal against the judgment from George Magistrates' Court delivered on 19 November 2010 in which it granted judgment in favour of the respondent (plaintiff in the Court *a quo*) against the appellant (the second defendant in the Court *a quo*) for payment of the sum of R99 017,58, interest, at the prime rate plus 2% per annum as from 30 April 2008 to date of payment; and costs on the attorney and client scale.

[2] The first defendant in the Court *a quo* was X Development and Construction (Pty) Ltd, the principal debtor ("X Development") in respect of whose indebtedness the appellant had stood surety. The first defendant in the Court *a quo* did not defend the action and judgment by default was sought and obtained against it. The first defendant was provisionally liquidated on 17 September 2008.

[3] The respondent's claim against the appellant is based on a deed of suretyship dated 23 November 2009 in terms of which the appellant, renouncing all legal benefits and exceptions, bound himself as surety and co-principal debtor to the respondent for the payment of all sums and the performance of all obligations which X Development owed to or became liable to perform to the respondent. It was further alleged in the respondent's summons that X Development owed the respondent the sum of R99 017,58 as at 30 April 2008 being the balance in respect of the agreed purchase price for goods sold by the respondent to X Development at the latter's special instance and request.

[4] In the Court *a quo* the parties agreed in terms of the Rule 29(5) of the Magistrates Court Rules on the facts on which the matter was to be determined. The agreed statement of facts read thus:

1. *'On 5 October 2006 Plaintiff and First Defendant, at George, entered into a written agreement, a copy of which is attached hereto as Annexure "SC1".*
2. *First Defendant is in breach of the agreement in that on 30 April 2008 it was indebted to Plaintiff in the amount of R99 017.58 for goods sold and delivered. This amount remains unpaid.*
3. *Second Defendant admits having bound himself as surety and co-principal debtor with the First Defendant in favour of the Plaintiff. A copy of such suretyship is attached hereto as Annexure "SC2".*

4. *On 17 September 2008 First Defendant was provisionally liquidated in the Western Cape High Court (Cape Town) as indicated in Annexure "SC3" hereto.*
5. *First Defendant was placed in final liquidation.*
6. *Plaintiff never proved a claim against the insolvent estate.*
7. *Plaintiff instituted action against First, Second and Third Defendants by summons herein issued on 7 July 2008 and served on Second Defendant on 14 July 2008. A copy of the return of service is annexed hereto as Annexure "SC4". It was served upon Me de la Harp (receptionist) at 20 Albert Street, the place of employment of Second Defendant.'*

[5] The parties initially proposed to argue three questions of law in terms of Rule 29(5), namely whether the appellant was bound and/or liable as surety and co-principal debtor for the payment of amount owing by X Development; whether the appellant renounced the benefits of excussion and division and finally whether the respondent had to take steps to excuss against X Development prior to it issuing summons against the appellant. However, after argument on 18 November 2010 the appellant's legal representative indicated that it was no longer necessary for the Court *a quo* to adjudicate on the second and third questions as the appellant conceded them. Accordingly the only question the Court *a quo* was required to determine was whether the appellant was "*bound and/or liable as surety and co-principal debtor for payment of the amount owing by*" X Development to the respondent.

[6] The Court *a quo* found that the appellant was liable to the respondent for the debt of the principal debtor up to and including 30 November 2008. The findings of the Court *a quo* are challenged on various grounds which are set out in the appellant's notice of appeal. In the appellant's heads of argument the challenge to the magistrate's findings is based on two main grounds. It is submitted that the magistrate erred in not finding firstly, that the respondent had failed to comply with

the provisions of sections 129 and 130 of the National Credit Act, Act 34 of 2005 ("the NCA"); and secondly, that the appellant's liability under suretyship had ceased as the suretyship on which the respondent sued the appellant provided that it was only valid up to and including 30 November 2008.

[7] It is common cause that the appellant signed a deed of suretyship on 23 November 2007 in terms of which the appellant bound himself to the respondent as surety and co-principal debtor "*for all and any present future obligations*" of X Development.

[8] Clause 3 of the deed of suretyship provided that the suretyship would remain in force until the surety was released in writing by the respondent. In terms of clause 11 the surety appointed his residential address as the address at which Court process and notice could be served or given ("*ie. domicilium citandi et executandi*"). The deed of suretyship also contained a handwritten endorsement which stated: "*valid up to 30th November 2008*"

[9] At the time of breach of the agreement by the principal debtor, the amount owed to the respondent was R99 017,58. On 7 July 2008 the respondent issued summons against the principal debtor and against the appellant, as surety and co-principal debtor, for the recovery of R99 017,58 plus interest and costs. According to the Sheriff's return of service, the summons was served on the appellant on 14 July 2008 by service of the copy thereof on Ms de la Harp at 20 Albert Street, George.

[10] The respondent applied for and obtained judgment by default against the principal debtor and the appellant on 12 September 2008. This judgment was subsequently rescinded at the instance of the appellant on 2 November 2009 because it was common cause that the institution of the proceedings by the respondent against the appellant for the recovery of the debt had not been preceded by a dispatch of a notice in terms of section 129 of the NCA either to the principal debtor or the appellant. The relevant notice was only sent to the appellant on 20 January 2010 following the order by the Court *a quo* on 1 December 2009 made under section 130(4) of the NCA directing the respondent to do so.

[11] Ms **Reilly** submitted on behalf of the appellant that the suretyship the appellant concluded with the respondent expired on 30 November 2008. She argued that as the suretyship contained a time limit during which the appellant was bound the appellant could not be sued on it after 30 November 2008 unless a demand for the recovery of the debt was made prior to 30 November 2008. The effect of the time stipulation, she argued, is to absolve the surety from all liability if he is not sued before the expiration of the period stipulated. In support of her contention Ms **Reilly** relied upon the judgment of this Court in the decision of *Boland Bank Ltd v Loeb and Others* 1995 (2) SA 142 (C) and Caney The Law of Suretyship 4th ed at 90 (which should be 6th ed at 105-106).

[12] Ms **Reilly** advanced two grounds on which she relied for the contention that the appellant could not be sued after 30 November 2008. She argued firstly, that the respondent failed to serve summons at the appellant's chosen *domicilium citandi et*

executandi as set out in paragraph 11 of the suretyship and secondly that the respondent failed to send to the appellant a notice under section 129 of the NCA.

[13] Ms **Reilly's** first contention should fail for two reasons. Firstly, the suggestion that the respondent failed to serve summons at the appellant's chosen *citandi et executandi* is not correct. The summons was served on 14 July 2008 on the appellant by delivering a copy of the summons on the receptionist at the appellant's place of employment which was the address of the principal debtor.

[14] It is correct that paragraph 11 of the suretyship provides that the residential address of the appellant was appointed by the appellant as the address where court process and notice might be served or given. But the appellant did not furnish the respondent with details of his residential address leaving the respondent to guess as to what address to use in serving the summons. The only addresses provided in the agreement forming basis of the suretyship are the appellant's work address (20 Albert Street, George) and the post office box address (P.O. Box 791 Wilderness) to which the section 129 notice was sent by registered mail.

[15] Secondly, the judgment in the *Boland Bank* case, supra on which Ms **Reilly** placed reliance is distinguishable on the facts of the instant case and does not provide support for the contention which she sought to advance. In any event, its correctness was doubted by the SCA in *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998(4) SA 885 (SCA) at 889 A.

[16] In *Boland Bank* the suretyship, which was executed on 16 August 1989, contained the following provision:

> *'this deed of suretyship and the surety's liability thereunder will be valid until 31 December 1990 whereupon it will expire unless extended in writing by the surety before that date'*

The question in that case was whether the time stipulation, when construed in the context of the suretyship as a whole, had the effect of absolving the surety from all liability under the suretyship upon the expiry of the period stipulated, or only in respect of debts incurred by the principal debtor after the expiry of the period. At 147I-148A the Court had this to say:

> *'....the time stipulation provides that the suretyship as well as the liability of the surety will be "valid" only until 31 December 1990. This, in my view, is an indication that what was intended was not only that the surety would not be liable for debts incurred after the date stipulated, but that all liability on the part of the surety was to cease on that date, including liability for pre-existing debts. If this were not the case, it would have been sufficient to record merely that the suretyship will only be valid until 31 December 1990. The reference to the liability of the surety would have been unnecessary.'*

[17] There were express indications in the *Boland Bank* case that a complete termination of liability under the suretyship was intended as of the indicated date. That much was conveyed in the underlined wording of the extract from the deed quoted above. The significance the Court attached to the underlined part of the extract is apparent from the underlined part of the dicta of Van Schalkwyk AJ also quoted above. In the instant case there are no such indications. Clause 3 of the deed of suretyship provides that the suretyship would remain in force until the surety was released in writing by the creditor. The endorsement on the deed of suretyship providing that the deed of suretyship was *"valid up to 30th November 2008"* should

not be read in isolation, but must be read together with other clauses in the deed of suretyship in particular clause 3.

[18] In my view the construction of the words *"valid up to 30 November 2008"* appearing on the deed of suretyship contended for by Ms **Reilly** is unwarranted. The general principles relating to the interpretation of contracts are applicable to the contract of suretyship. In interpreting a contract the intention of the parties must be ascertained from the language they have used in the contract itself, giving effect to the ordinary meaning of their words and to the grammatical sense in which they have expressed themselves unless it appears from the context that both parties intended their language to have a different meaning (*Delmas Milling Co. Ltd v Du Plessis* 1955 (3) SA 447 (A) at 453E. It is an unrewarding and misleading exercise to seize on one word in a document, determine its more usual or ordinary meaning, and then, having done so, to seek to interpret the document in the light of the meaning so ascribed to that word (*List v Jurgers* 1979(3) SA 106 (A)).

[19] In my view, on a proper construction of the suretyship, the endorsement stating that the suretyship will be valid up to 30 November 2008 provides the latest date on which the surety will be released from the suretyship thus relieving the respondent of the need to give notice releasing the surety from suretyship in terms of Clause 3. Clause 3 and the endorsement clause do not deal with the liability of the surety for the incurred debts. They deal with the release of the surety from suretyship. In other words, the release of the surety from the suretyship does not result in the surety being discharged from all his liability under the suretyship. His liability in relation to an amount due at the time of his release from suretyship

remains unaffected.[1] The construction of the suretyship contended for by Ms **Reilly** would lead to the creditor losing his accrued rights against the surety. It is unlikely that the respondent would agree to an arrangement in which his accrued rights against the appellant all vanish after 30 November 2008 unless he had sued or at least demanded payment from the appellant. In my view Ms **Reilly's** construction of the suretyship should be rejected as "*so unbusinesslike*" (cf *Langston Clothing* supra at 888I) and as Caney supra correctly points out at p106: *"creditors, after all, are unlikely to agree to an arrangement in which their accrued rights – including rights very recently accrued – against the surety all vanish on a fixed date unless they have by then sued or at least demanded payment from the surety"*

[20] I turn now to consider Ms **Reilly's** argument regarding the respondent's failure to deliver a notice in terms of section 129 to the appellant prior to the institution of the proceedings and whether such failure affected the appellant's liability under the suretyship. I shall address Ms **Reilly's** section 129 argument despite the fact that there is no reference at all to the provisions of the NCA in the pleadings or in the special case in terms of Rule 29(5) and the Court a quo was not called upon to adjudicate any question in relation thereto. I consider it necessary to deal with it since its non-compliance by the respondent is raised as a basis for the contention that the appellant was absolved from liability under the suretyship.

[21] Assuming in favour of the appellant that the credit facility extended by the respondent to the principal debtor is a credit agreement to which the NCA applies notwithstanding that the principal debtor is a juristic person, the suretyship on which

[1] *Kalil v Standard Bank of South Africa Ltd* 1967 (4) SA 550 (A) at 555G-H; *Langston Clothing (Properties) CC v Danco Clothing (Pty) Ltd* 1998 (4) SA 885 (SCA) at 888I-J.

the respondent's action is founded is also a credit agreement which could be enforced only subject to the requirements of the NCA. Section 129(1) of the NCA provides:

> *"(1) If the consumer is in default under a credit agreement, the credit provider-*
>
> *(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date ; and*
>
> *(b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before –*
>
> *(i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10), as the case may be; and*
>
> *(ii) meeting any further requirements set out in section 130."*

[22] Section 130(1) makes the following provisions:

> *"(1) Subject to subsection (2), a credit provider may approach the Court for an order to enforce a credit agreement only if, at that time, the consumer is in default and has been in default under that credit agreement for at least 20 business days and –*
>
> *(a) at least 10 business days have elapsed since the credit provider delivered a notice to the consumer as contemplated in section 86 (9)[2], or section 129 (1), as the case may be;*
>
> *(b) in the case of a notice contemplated in section 129 (1), the consumer has –*
>
> *(i) not responded to that notice; or*
>
> *(ii) responded to the notice by rejecting the credit provider's proposals; and*
>
> *(c) in the case of an instalment agreement, secured loan, or lease, the consumer has not surrendered the relevant property to the credit provider as contemplated in section 127."*

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[2] *There is no reference to section 86 (9) in section 129(1). It refers to section 86 (10). The reference to section 86(9) is erroneous. Cf. e.g. Coetzee and Another v Nedbank Ltd 2011 (2) SA 372 (KZD) at para 5, fn 5.*

[23] There are two submissions made by the appellant in relation to non-compliance by the respondent with the provisions of section 129. The first one is that the notice sent by the respondent was defective in that it was sent to the incorrect address. It is argued by the appellant that the respondent ought to have delivered the notice in terms of section 129 to the appellant's appointed *domicilium citandi et executandi* at his residential address.

[24] The appellant's contention, however, ignores the fact that the appellant failed to identify in the deed of suretyship his residential address at which he wanted service of process to be effected. The only address which the appellant provided in the agreement forming the basis of the suretyship is his post office box which is the address to which a section 129 notice was sent in terms of section 130(4) of the NCA. In my view a section 129 notice was properly sent. In the circumstances the appellant's first contention must fail.

[25] The second contention raised by the appellant in relation to non-compliance by the respondent is that a section 129 notice which was sent to the appellant on 20 January 2010 in terms of section 130(4) was made outside of the time period for which the appellant was to be liable to the respondent in terms of the suretyship.

[26] Ms **Reilly's** contention misconstrues the object and purpose of the section 129(1)(a) notice. Delivery of the section 129 (1) (a) notice is a step devised by the legislature in an attempt to encourage parties to iron out their differences before seeking Court intervention and its purpose is to give effect to the object of the NCA as set out in section 3(h) (*First Rand Bank Ltd v Olivier* 2009(3) SA 353 (SE)

paragraph 18) by encouraging a consistent and accessible system of consensual resolution of disputes arising from credit agreements. (*Nedbank Ltd v National Credit Regulator* 2011 (3) SA 581 (SCA)). It is not the purpose of the NCA to encourage the debtors to evade their contractual obligations under the credit agreements and it is for this reason that in any proceedings in terms of section 130 if the Court determines that the credit provider has not complied with the relevant provisions of the Act it must adjourn the matter before it and make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed. In other words, the respondent's failure to comply with section 129 before instituting the proceedings to enforce the suretyship did not render the proceedings invalid.

[27] The Court *a quo* correctly applied the provisions of section 130 of the NCA. As required by section 130(3) of the NCA it considered whether there had been compliance with the procedures required by section 129. It was not satisfied that there had been proper compliance and acting under section 130(4) (b) the Court *a quo* ordered the respondent on 1 December 2009 to forward to the appellant a notice in terms of section 129, which the respondent did on 20 January 2010. It is not in dispute that the appellant received the notice. Thus even if the notice had been addressed to a different address to that nominated by the appellant, the object of the NCA requiring the despatch of the notice was achieved. In the result Ms Reilly's second contention should fail.

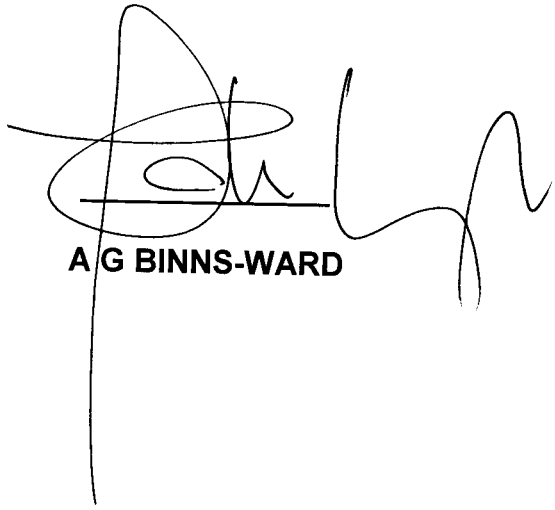
[28] In the result the following order is made:

The appeal is dismissed with costs.

D H ZONDI

BINNS-WARD J

I agree.



A G BINNS-WARD